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JOHN F. DAVIS, CLERK

Supreme Court of the United States

OCTOBER TERM, 1969

No. [redacted] 241

MARGARET CURRY, as Administratrix of the Estate of WILLIAM CURRY, deceased, and Individually as the Widow and next of kin of WILLIAM CURRY, deceased,

Petitioner,

—against—

P. D. MARCHESSINI, INC., P. D. MARCHESSINI & CO., LTD. (also operating as P. D. MARCHESSINI & Co., New York, Inc.),

Respondents,

—against—

ATLANTIC STEVEDORING CO., INC.,

Third Party Respondent,

—and—

LIBERTY MUTUAL INSURANCE COMPANY,

Applicant for Intervenor.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Of Counsel

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1527

MARGARET CURRY, as Administratrix of the Estate of WILLIAM CURRY, deceased, and Individually as the Widow and next of kin of WILLIAM CURRY, deceased,

Petitioner,

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Statement

Petitioner seeks review of an order of the United States Court of Appeals, Second Circuit (4a).* The aforesaid

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* Note:—Reference to Petitioner's appendix will be designated by "a", and reference to Respondent's appendix will be designated by "A".

order affirmed a judgment of the United States District Court for the Southern District of New York (1a) (274 F. Supp. 167), wherein judgment on the pleadings was granted to respondents on the grounds that this action was barred by the two-year Georgia Statute of Limitations.

The action was brought under the Georgia Wrongful Death Statute (Ga. Code Ann. §§105, 1302, 1309 [1956]), which contains a two-year Statute of Limitations. It was commenced on March 3, 1964 in the United States District Court for the Southern District of New York by Margaret Curry as an Administratrix of the Estate of William Curry for injuries sustained by, and wrongful death to, William Curry which allegedly occurred on October 30, 1960 while he was employed as a longshoreman on board the S.S. "EURYLOCHUS".

Both the district court and the Court of Appeals, in accordance with well established doctrine and a long line of decisions of this Honorable Court, held that the action had not been timely brought (1a, 4a). In spite of this, and in spite of the continued reaffirmance by this Honorable Court of its decisions on this subject, petitioner seeks once again to have the matter reviewed.

In addition to the above, it should be pointed out that Margaret Curry, the plaintiff in this action, died on the 3rd day of September, 1968; that no substitution for her has ever been made; and that there has been no showing in this action of the existence of a party who could properly be substituted for her.

Prior to the filing of the petition seeking a Writ of Certiorari, an attempt was made to substitute Sidney L. Raskin, Executor of the Estate of Margaret Curry, as

party plaintiff. A motion was made to the United States District Court for the Southern District of New York. The Court, however, by order dated June 13, 1967, denied the motion stating that there had been no showing by the movant that the substitution sought was proper (A-1). The petition in this matter was therefore filed without a proper party plaintiff in existence and without the authority and consent of one who had standing to litigate.

Questions Presented

1. Whether this Honorable Court should overrule its prior decisions, and defeat the intent of Congress to preserve State sovereignty over deaths caused by maritime torts within the State's territorial waters?

2. Whether this Honorable Court should grant a Writ where there is no proper party plaintiff in existence and where the petition for Writ of Certiorari was filed without the authority or consent of one with standing to litigate?

Reasons for Denying the Writ

1. At the time of filing the petition seeking a Writ of Certiorari there was no proper party plaintiff in existence and the petition was filed without the authority or consent of one who had standing to litigate. It has long been the practice of this Honorable Court not to grant Writs of Certiorari in matters where there exists no standing to litigate and where there is no matter which is then justiciable.

2. Petitioner, furthermore seeks a Writ of Certiorari on a subject on which this Court has quite clearly spoken in the past. See *The Harrisburg,* 119 U. S. 199, 7 S. Ct. 140; *Western Fuel Co.* v. *Garcia,* 257 U. S. 233, 42 S. Ct. 89; *Tungus* v. *Skovgaard,* 358 U. S. 588, 79 S. Ct. 503; *Goett* v. *Union Carbide Corporation,* 361 U. S. 340, 80 S. Ct. 357; *Hess* v. *U. S.,* 361 U. S. 314, 80 S. Ct. 341. No new reasons are put forth why this Honorable Court should reverse its prior holdings or why it should defeat the intent of Congress to preserve State sovereignty over deaths caused by maritime torts within the State's territorial waters. See S. Rep. No. 216, 66th Cong. 1st Sess. 3; H. R. Rep. No. 674, 66th Congress. Also see *Tungus* v. *Skovgaard, supra.* What appears to be petitioner's sole basis for seeking a Writ of Certiorari is that the adoption by admiralty of State's Wrongful Death Acts "cum onere" would somehow destroy uniformity. This argument was rejected by this Honorable Court in both *Tungus* v. *Skovgaard, supra,* and *Hess* v. *U. S., supra,* when the following was stated:

> "The policy expressed by a State Legislature in enacting a wrongful death statute is not merely that death shall give rise to a right of recovery, nor even that tortious conduct resulting in death shall be actionable, but that damages shall be recoverable when conduct of a particular kind results in death. It is incumbent upon a court enforcing that policy to enforce it all; it may not pick or choose. 358 U. S. at 593.
>
> Even Southern Pacific Co. v. Jensen, which fathered the 'uniformity' concept, recognized that uniformity is not offended by 'the right given to recover in death cases.' 244 U. S. 205, at 216. It would be an anomaly

to hold that a State may create a right of action for death, but that it may not determine the circumstances under which that right exists. The power of a State to create such a right includes of necessity the power to determine when recovery shall be permitted and when it shall not. Cf. Caldarola v. Eckert, 332 U. S. 155. 358 U. S., at 594."

Petitioner, furthermore, seems to ignore the fact that state wrongful death statutes are not remedial in nature but created new legal liabilities, *The Harrisburg, supra,* and that there is nothing repugnant or unfair about letting a State treat *all* of its citizens with evenhandiness in the administration of a cause of action which it itself created.

Finally, it should be pointed out that in the past when there has been a need in maritime matters to enact federal death legislation, Congress has done so and not the Courts (e.g., Jones Act and Death on the High Seas Act).

In view of the above it is respectfully submitted that there has been no showing made by petitioner of any basis for the issuance of a Writ of Certiorari in this matter.

CONCLUSION

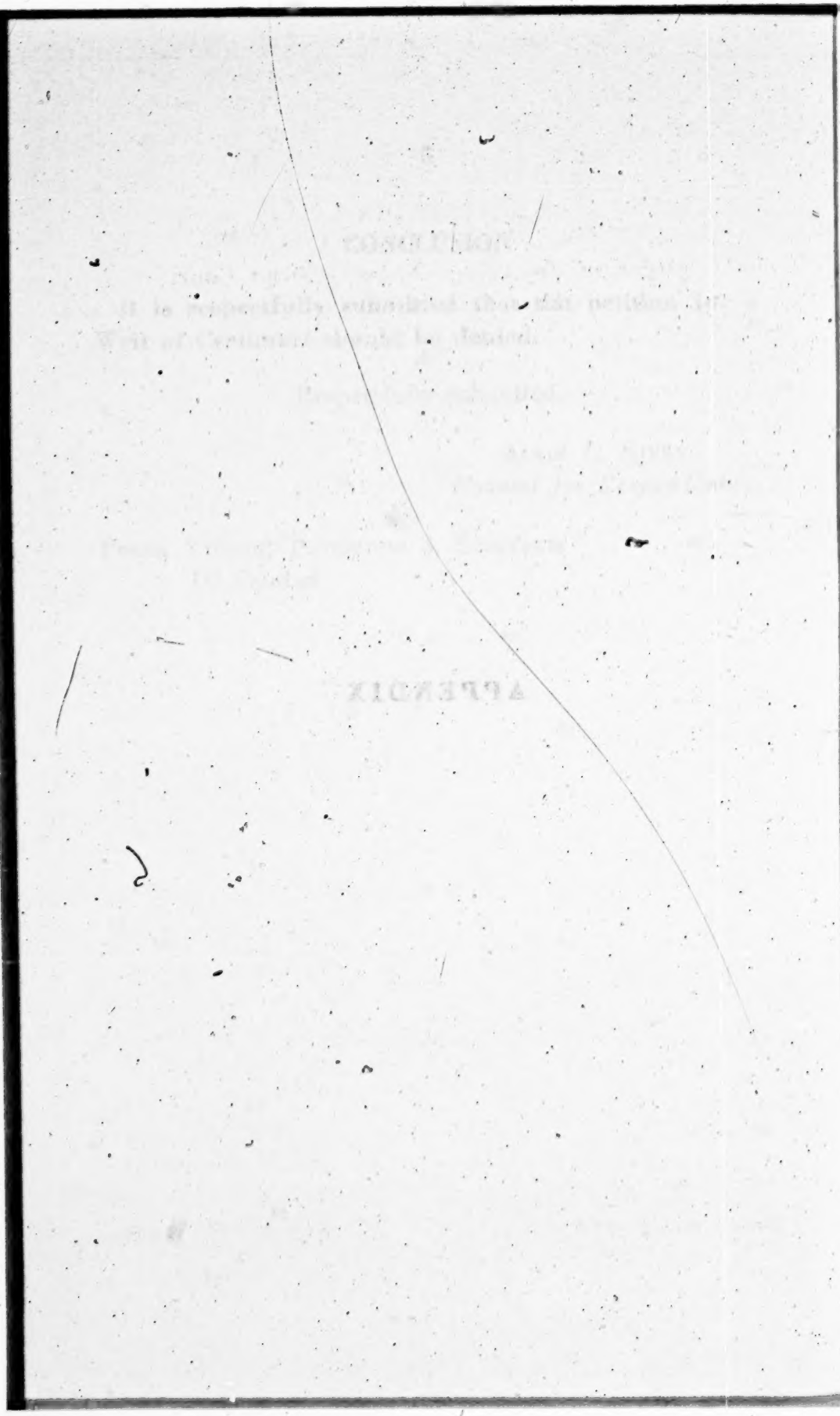
It is respectfully submitted that the petition for a Writ of Certiorari should be denied.

Respectfully submitted,

ALVIN L. STERN
Counsel for Respondents

POLES, TUBLIN, PATESTIDES & STRATAKIS
Of Counsel

APPENDIX



APPENDIX

Order of the United States District Court Southern District of New York

TENNEY, J.

This is a motion brought on by way of order to show cause seeking the substitution of Sidney L. Raskin, Executor of the Estate of Margaret Curry in place of Margaret Curry herself, now deceased, as party plaintiff herein. In reaching a determination, this Court is bound to follow the law of Georgia.

The Georgia statute which governs in this instance, that is, Ga. Code Ann. § 3-505 at 146 (1962) states that:

> ". . . [a] cause of action [wrongful death], in case of death of the plaintiff, shall, *in the event there is no right of survivorship in any other person,* survive to the personal representative of the deceased plaintiff. . . ." (Emphasis supplied.)

Therefore, where a wife sues for the homicide of her husband and dies during the pendency of the litigation, the action survives in the first instance to the children of the deceased, if any be in life. If there be no children, then the cause of action survives to the personal representative of the deceased plaintiff. *Keenan Welding Supplies Co.* v. *Bronner,* 100 Ga. App. 400, 111 S.E.2d 140 (Div. 1 1959); *Campbell* v. *Western & Atlantic R.R.,* 194 S.E. 927 (Div. 1 1938).

Inasmuch as there has been no showing by the movant herein that no children of William Curry exist to whom there would accrue a right of survivorship, the instant

motion is denied with leave to renew upon filing of proof that, in fact, no children do exist who have the right to pursue this cause of action.

So ordered.

Dated: New York, New York
June 13, 1969.

CHARLES H. TENNEY
U.S.D.J.